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Supreme Court, U.S.
FILED
FEB 4 1997
CLERK

No. 96-292

In The

Supreme Court of the United States

October Term, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Idaho

REPLY BRIEF FOR PETITIONERS

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26 pp

TABLE OF CONTENTS

Page

Reply to Respondent's Statement of the Case 1

Argument 2

I. When a Federal Case Is Brought in State Court, the State Court Must Proceed in a Manner that Protects the Rights of the Litigants Under Federal Law 2

II. The Possibility of Permissive Appeal Under Idaho Appellate Rule 12(a) Does Not Adequately Protect the Qualified Immunity Defense 7

III. Denial of an Immediate Appeal Is Outcome-Determinative 8

IV. Idaho's Procedural Policy Discriminates Against a Federal Right, But Even if It Did Not and It Were Neutral, It Could Still Be Preempted 9

V. A Request for Injunctive Relief Does Not Affect The Determination Whether State Courts Must Allow Immediate Appeal from Denial of Qualified Immunity Motions 11

VI. Petitioners Are Not Seeking to Federalize State Procedural Law 12

VII. Section 1983 Defendants Should Not Be Required to Remove Their Cases to Federal Court to Ensure Their Federal Rights Are Protected 13

VIII. Requiring Idaho Courts to Protect the Qualified Immunity Defense Does Not Undermine Federalism 15

TABLE OF CONTENTS – Continued

Page

IX. The Interests at Stake Include Those of the Petitioners Sued in Their Individual Capacities as Well as Those of the State 16

X. This Court Has Never Held that a State May Make Litigating A Federal Claim So Congenial as to Alter the Federal Cause of Action or Undermine the Federal Defense 18

TABLE OF AUTHORITIES

Page

CASES

Barron v. Reich, 13 F.3d 1370 (9th Cir. 1994) 13

Behrens v. Pelletier, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996) 11

Brigham v. Department of Health and Welfare, 106 Idaho 347, 679 P.2d 147 (1984) 2

Brown v. Western Railway of Alabama, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949) 3, 6, 10, 12

Budell v. Todd, 105 Idaho 2, 665 P. 2d 701 (1983) 7

Central Vermont Ry. Co. v. White, 238 U.S. 507, 35 S. Ct. 865, 59 L. Ed. 1433 (1915) 4, 6

Davis v. Wechsler, 263 U.S. 22, 44 S. Ct. 13, 68 L. Ed. 143 (1923) 4

Dice v. Akron, C&Y.R. Co., 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952) 3, 6, 10, 12

Dufur v. Nampa & Meridian Irr. Dist., 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996) 1

El Paso & N.R.Co. v. Gutierrez, 215 U.S. 87, 30 S. Ct. 21, 54 L. Ed. 106 (1909) 4

Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) ..... *passim*

Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) 18

Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942) 4, 6, 10, 12

Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

In re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 (1995) 17

Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) 19

Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) 6, 7, 8

Moor v. County of Alameda, 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973) 19

Patsy v. Board of Regents, 457 U.S. 496, 102 S. Ct. 2257, 73 L. Ed. 2d 172 (1982) 15

State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985) 17

State v. Lewis, 96 Idaho 743, 536 P.2d 738 (1975) 15

State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992) 17

Testa v. Katt, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967 (1947) 15

Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) 17

Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 254 (1985) 14, 19

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

42 U.S.C. § 1983 ..... *passim*

Idaho Const., art. V, § 9 15

Idaho Code § 1-2406 ..... 1, 15

Idaho Code § 1-2409 1

TABLE OF AUTHORITIES – Continued

Page

Idaho Code § 6-903 17

Idaho Code § 6-905 5

Idaho Code § 6-908 5

Idaho Code § 19-2804 15

Federal Rule of Civil Procedure 12(b)(6) 13

Idaho Rule of Civil Procedure 12(b)(6) 13

Idaho Appellate Rule 11 9

Idaho Appellate Rule 12 7

OTHER AUTHORITIES

Idaho Courts Annual Report 1995, Appendix 1

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Before proceeding to their legal argument, Petitioners would like to address two factual points. First, Respondent asserts at pp. 8, 16 and 31 of her brief that Idaho has no appellate court other than the Idaho Supreme Court and that all appeals from district court are heard directly by the Idaho Supreme Court. This is incorrect. The Idaho Court of Appeals began operations in 1982 and is assigned approximately fifty percent of the appellate cases in this state. Idaho Courts Annual Report 1995, Appendix, p. 1. On appeal from the district court, the Idaho Supreme Court may assign any appeal other than death penalty appeals to the Idaho Court of Appeals. Idaho Code § 1-2406(1) (1990). The Court of Appeals can and does hear cases involving 42 U.S.C. § 1983. *E.g., Dufur v. Nampa & Meridian Irr. Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct. App. 1996). The Idaho Supreme Court is not required to review cases that have already had appellate review in the Idaho Court of Appeals. Idaho Code § 1-2409 (1990).

Second, Respondent states that she is seeking injunctive relief against Dyke Nally, the current supervisor of the Idaho State Liquor Dispensary, who, Respondent asserts, "was added in the second amended complaint, in place of the State Liquor Dispensary, which was one of the original named defendants" and that Petitioners had "not sought to appeal with regard to Respondent's claim for injunctive relief." Respondent's Br., p. 4, n.2, and p. 7. Respondent was not seeking injunctive relief against Nally at times germane to this petition for certiorari. Respondent, in her first amended complaint, sought injunctive relief only against the Idaho Liquor Dispensary. J.A. 11. The Liquor Dispensary was dismissed as a party by the district court before Petitioners filed their notice of appeal to the Idaho Supreme Court. J.A. 62. Because the Dispensary was dismissed by the trial court, when Respondent asserts that Petitioners had "not sought to appeal with regard to respondent's claim for injunctive relief," Petitioners did not then appeal because there was no

claim for injunctive relief pending before the Idaho District Court from which an appeal could be taken.

Following remand of this case from the Idaho Supreme Court to the district court, Respondent moved to amend her first amended complaint and add Dyke Nally as a party. Petitioners then filed their petition for certiorari. Petitioners later moved to stay proceedings before the Idaho district court pending this Court's disposition of their petition for certiorari, and on the same day Petitioners stated they had no objection to the amendment. The trial court stayed all proceedings, and nothing more has been filed at the trial level.[1]

ARGUMENT

I. WHEN A FEDERAL CASE IS BROUGHT IN STATE COURT, THE STATE COURT MUST PROCEED IN A MANNER THAT PROTECTS THE RIGHTS OF THE LITIGANTS UNDER FEDERAL LAW

The primary premise underlying Respondent's Brief is that when a federal case is litigated in state court, the litigants

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[1] Petitioners would also like to clarify one issue regarding Idaho employment law to avoid misimpressions. Footnote 3 on p. 4 of Respondent's Brief states: "Idaho classified probationary employees may only be terminated for failure to satisfactorily complete their entrance probationary period." Importantly, however, probationary employees do not have a right to appeal a determination that they failed to satisfactorily complete the probationary period. In *Brigham v. Department of Health and Welfare*, 106 Idaho 347, 679 P.2d 147 (1984), the Idaho Supreme Court held:

> Unless specifically exempted from any of the rights accorded to all classified employees, probationary employees are entitled to the full range of procedural rights set forth in the Act. *The only right so denied probationary employees is the right to appeal a dismissal based on unsatisfactory performance.*

106 Idaho at 350, 679 P.2d at 150 (emphasis added). Thus, it is doubtful that probationary employees' dismissals implicate any established liberty or property rights.

must take the state courts as they find them, and state procedural rules and policies cannot be displaced, regardless of their impact upon federal rights. *E.g.*, Respondent's Br., pp. 12-13. However, such an absolute principle has never been adopted by this Court. Rather, when presented with a case in which a federal claim is litigated in state court, and a federal right is undermined by state law or procedure, this Court has looked to the nature of the federal right at stake and the impact of the state procedure or policy upon that right. While this Court has often been sharply divided in particular cases, in those instances where the federal right is substantial and the state procedure undermines that right, this Court has preempted the state procedure and, if necessary, required that a federal procedure be followed instead.

For example, in *Dice v. Akron, C&Y.R. Co.*, 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952), the Court held that the federal right to a trial by jury was a "fundamental feature of our system of federal jurisprudence," and that Ohio, when hearing a case brought under the Federal Employers Liability Act (FELA), could not send a factual issue concerning fraud to a judge, rather than a jury, for determination. *Id.*, at 363, 72 S. Ct., at 315. The Court reached this conclusion even though the Seventh Amendment right to a jury does not apply to the states, and Ohio, in its state negligence cases, routinely sent issues of fraud to the judge. *Id.*, at 362-63, 72 S. Ct., at 315.

Likewise, in *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949), this Court refused to allow Georgia courts hearing FELA actions to apply Georgia's general practice of construing complaints strictly against the pleader. The *Brown* Court was squarely presented with the argument that state courts are "free to follow their own rules of practice and procedure." *Id.*, at 295, 70 S. Ct., at 106. In responding to this proposition, the Court was candid in its assessment that "to what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question." *Id.* The Court, nevertheless, concluded that a "federal right cannot be defeated by the forms of local practice" and that to hold otherwise would

mean that the "desirable uniformity in adjudication of federally created rights could not be achieved." *Id.*, at 296, 299, 70 S. Ct., at 106, 108.

In *Garrett v. Moore-McCormack*, 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942), the Court prefaced its discussion with the statement, "This Court has specifically held that the Jones Act is to have a uniform application throughout the country unaffected by 'local views of common law rules.' " *Id.*, at 244, 63 S. Ct., at 250. In the state court action brought under the Jones Act, this Court rejected a Pennsylvania policy placing on plaintiffs the burden of proof to overcome a release that was inconsistent with federal admiralty policy of requiring a defendant to sustain the release, stating:

> The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction to which the right itself originates. . . . [I]n trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Id., at 245, 62 S. Ct., at 251 (footnotes omitted). *See also El Paso & N.R.Co. v. Gutierrez*, 215 U.S. 87, 92, 30 S. Ct. 21, 23, 54 L. Ed. 106 (1909) (rejecting a territorial statute's notice-of-claim requirement before bringing a FELA action); *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 512, 35 S. Ct. 865, 868, 59 L. Ed. 1433 (1915) (holding a state rule that plaintiff must prove that he was not contributorily negligent could not apply in a FELA action brought in state court because Congress preferred the federal rule that defendant must prove plaintiff's contributory negligence); and *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143 (1923) (holding a state could not apply a local practice that resulted in a waiver of a federal venue defense).

Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), is an example of this principle being applied in the § 1983 context. In *Felder*, this Court rejected the argument that federalism requires "federal law to take the state courts as it finds them," stating that federal law takes state courts as it finds them only insofar as those courts do not impose unnecessary burdens on federal rights and, further, that the "very notions of federalism upon which respondents rely dictate that the state's outcome determinative law must give way when a party asserts a federal right in state court." 487 U.S., at 150-151, 108 S. Ct., at 2313. This Court, in holding Wisconsin could not apply its notice-of-claim requirement to a § 1983 claim, emphasized the need for uniformity in § 1983 litigation, the importance of protecting the substantial federal rights of the litigants appearing in state court and the importance of fulfilling federal policies and objectives.[2]

To counter *Felder*, Respondent asserts that the federal right protected in that case was the § 1983 claim itself, but here Petitioners seek to assert a federal procedure stemming from 28 U.S.C. § 1291, the right to an immediate appeal from

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[2] Respondent makes much of the fact that the State of Idaho joined in an amicus effort in *Felder* arguing in favor of the State of Wisconsin and its notice-of-claim statute. However, that was the losing side of the case, and the holding of *Felder*, consistent with the earlier line of cases discussed above, was that a state, in hearing § 1983 cases, was obligated to proceed in a manner that protected the substantial rights of the parties under federal law. Petitioners are not seeking to unravel the *Felder* holding. As § 1983 defendants, they ask only that they receive equal treatment under this principle and that their federal defense, like the federal claim itself, not be extinguished by state law. Moreover, if Respondent truly believed in the litigants taking state courts as they find them, then her action should be dismissed for failing to comply with the Idaho Tort Claims Act's 180-day notice-of-claim requirement. See Idaho Code §§ 6-905 and 908. However, *Felder* precludes this result.

a final decision, and that this is distinct from a federal substantive right. This characterization of Petitioners' arguments ignores the underlying premise of *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985): Denial of a qualified immunity motion is final and substantive because proceeding to discovery and trial when a defendant is entitled to qualified immunity irreparably destroys the primary substantive benefits of the defense, among them avoidance of litigation. It is the immediate appeal that is essential to preserve the underlying substantive right. Whether the asserted right of appeal is characterized as procedural or substantive is artificial in this context; without the immediate appeal, as this Court held in *Mitchell*, the substantive right – "an entitlement not to stand trial or bear the burdens of litigation" – is lost. 472 U.S., at 526, 105 S. Ct., at 2815.

As importantly, as *Dice*, *Brown*, *Garret* and *Central Vermont* each illustrate, when necessary to protect an important underlying federal right or policy, this Court has not only displaced the state procedure, it has required that the federal procedure (in those cases, a jury determination of fact, the manner in which pleadings are construed, a federal presumption concerning releases and the federal allocation of the burden of proof on contributory negligence) be followed in its place. The federal right at stake here is critically important as a personal defense to § 1983 defendants, as is the underlying federal policy it protects – allowing speedy resolution of insubstantial claims and avoiding the disruptive impact that discovery and trial can impose on public officers. These interests warrant protection regardless of the forum in which a § 1983 claim is brought.[3]

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[3] Respondent also argues that "the legislative history of section 1983 reveals no intent to modify then well known and established state procedures for resolving litigation." Respondent's Br., p. 32. However, as this Court pointed out in *Felder*, 487 U.S., at 147, n.14, 108 S. Ct., at 2311, n.14, simply because Congress did not anticipate certain procedural developments when § 1983 was enacted does not suggest that all future state procedures would be consistent with the purposes and intent of the federal civil rights law. Qualified immunity is a defense Congress intended to remain intact in § 1983 litigation, *Howlett v. Rose*, 496 U.S. 356, 383, 110 S. Ct. 2430, 2446, 110 L. Ed. 2d 332 (1990), and denial of a qualified immunity motion is a final order from which an immediate appeal is necessary to protect the substantive benefits of the entitlement. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Given these decisions, the Idaho Supreme Court's dismissal of Petitioners' appeal from the denial of their qualified immunity motion defeats federal law and policy.

II. THE POSSIBILITY OF PERMISSIVE APPEAL UNDER IDAHO APPELLATE RULE 12(a) DOES NOT ADEQUATELY PROTECT THE QUALIFIED IMMUNITY DEFENSE

Respondent also argues that Petitioners' federal right to a qualified immunity defense is adequately protected by Idaho law because Idaho Appellate Rule 12(a) allows permissive appeals from interlocutory orders. Respondent contends that under this rule, a § 1983 defendant with a "proffered qualified immunity defense" that "turns on a question of law has a right to have his or her request for review considered by the Idaho Supreme Court," so presumably the opportunity to ask for permissive appeal adequately protects the underlying federal immunity. Respondent's Br., p. 10.

Obviously, the opportunity to request review by an appellate court is very different indeed from having a request for review granted or having a right of review. Idaho Appellate Rule 12(a) has been construed narrowly by the Idaho Supreme Court. The Idaho Supreme Court has held that it "intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11." *Budell v. Todd*, 105 Idaho 2, 4, 665 P. 2d 701, 703 (1983). In *Mitchell*, the Court found the right of immediate appeal to be necessary to preserve the underlying defense. The Court did not suggest that optional review would be sufficient.

III. DENIAL OF AN IMMEDIATE APPEAL IS OUTCOME-DETERMINATIVE

Respondent further attempts to distinguish *Felder* by arguing that, unlike the notice-of-claim requirement that plaintiff failed to meet in that case, an erroneous denial of qualified immunity that cannot be immediately appealed is not outcome-determinative, but instead only "affects the order in which the issues presented will be resolved." Respondent's Br., p. 13. This Court has unequivocally held that the qualified immunity "entitlement is an *immunity from suit* rather than a mere defense to liability" and, further, that the entitlement "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S., at 526, 105 S. Ct., at 2815. The nature of the right is not to have to stand trial or bear the burdens of discovery, and, as to that right, an erroneous denial of the defense that cannot be immediately reviewed is outcome-determinative: The right is irretrievably lost when the case proceeds to trial. It is not an adequate remedy to learn from an appellate court, after discovery and trial are over, that the trial court erred in its initial determination. Moreover, Petitioners note that unlike *Felder*, where some § 1983 plaintiffs could surely meet Wisconsin's 120-day notice-of-claim requirement, there are no steps a § 1983 defendant can take in Idaho as a matter of right to protect the federal qualified immunity defense following an erroneous trial court ruling. To that extent, Idaho's procedural policy is more outcome-determinative than Wisconsin's.

As importantly, the issue of different outcomes between federal and state forums goes directly to the concern over uniformity. There is a balance in § 1983 litigation. The statute is remedial in purpose, yet it is not meant to be applied in a manner that chills governmental discretion or unduly interferes with the ability of government officials to carry out their duties. The federal immunity defenses play a critical role in this balance. Allowing a state that hears § 1983 litigation to proceed in a manner that effectively extinguishes the federal defense creates different incentives in § 1983 litigation and, ultimately, a different balance between the statute's remedial

goals and the need not to unduly disrupt the effective operation of government. Rather than a speedy resolution of insubstantial claims, if a trial court erroneously rules on the immunity defense and there is no right to immediate appellate review, there will be an incentive to settle those insubstantial claims with a monetary payment to avoid the burdens of litigation. This result undermines the current balance in place, contravenes Congressional intent that common law immunities remain intact, see *Howlett v. Rose*, 496 U.S., at 383, 110 S. Ct., at 2446, and conflicts with this Court's concern that the civil rights laws be given uniform application regardless of whether § 1983 claims are brought in state or federal court within the same state, *Felder*, 487 U.S., at 153, 105 S. Ct., at 2314. The balancing as to the most fundamental issues surrounding § 1983 litigation, including the benefits of the qualified immunity defense, should be the same whether a case is brought in federal or state court, and that cannot be achieved if the federal defenses can be defeated in state court by state law.

IV. IDAHO'S PROCEDURAL POLICY DISCRIMINATES AGAINST A FEDERAL RIGHT, BUT EVEN IF IT DID NOT AND IT WERE NEUTRAL, IT COULD STILL BE PREEMPTED

Respondent also contends that Idaho is not discriminating against a federal right because Idaho Appellate Rule 11 applies alike to state and federal claims. This Court pointed out in *Felder* that Wisconsin's notice-of-claim requirement applied to state and federal claims, but the requirement was nevertheless considered discriminatory as compared to tort claims against non-governmental entities.

Idaho Appellate Rule 11 and the Idaho Supreme Court's application of Rule 11 is discriminatory in a similar sense: Under that rule, interlocutory appeals may be had in areas where the Idaho Supreme Court, in promulgating the rule, has determined a state policy is advanced, but in this federal case, even though a denial of immediate review defeats the federal defense and the underlying federal policy, review cannot be

obtained. The Idaho Supreme Court hears interlocutory appeals for numerous state law claims, including those involving probate, reduction of criminal charges, or suppression of evidence. Rule 11 is not "simply part of 'the vast body of procedural rules, rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of "the cause of action" as applied to any given [litigant].' " *Felder*, 487 U.S., at 145, 108 S. Ct., at 2310. The right to an interlocutory appeal is explicitly tied to particular categories of substantive law. Immediate appeals are authorized for those categories where the Idaho Supreme Court has determined, in promulgating the rule, that a state policy is advanced by allowing the immediate appeal. The federal defense here and its underlying federal policy cannot be preserved without a right of immediate appeal, and it should be protected by state appellate courts.

Perhaps more importantly, as this Court's precedents in *Dice*, *Brown* and *Garrett* illustrate, a state procedural rule does not have to be discriminatory to, nevertheless, be preempted. Even neutral state procedural rules must be preempted if they undermine federal rights. *See also Howlett v. Rose*, 496 U.S., at 372, 110 S. Ct., at 2441 ("States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.") The Idaho Supreme Court's position would effectively extinguish the primary benefits of the federal immunity entitlement in those cases where trial courts erroneously deny the defense. This outcome directly conflicts with this Court's requirement in *Felder* that state courts hearing federal claims proceed in a manner that protects the federal rights of the litigants. The rights of § 1983 defendants are not protected if the primary federal law defense can be defeated by state procedural rules.

V. A REQUEST FOR INJUNCTIVE RELIEF DOES NOT AFFECT THE DETERMINATION WHETHER STATE COURTS MUST ALLOW IMMEDIATE APPEAL FROM DENIAL OF QUALIFIED IMMUNITY MOTIONS

Respondent argues that because she is seeking injunctive relief,[4] "petitioners . . . will face discovery and the necessity of testifying at the trial of the equitable claim regardless of whether their qualified immunity defense is sustained prior to trial." Respondent's Br., p. 7. But, just last term, in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996), the Court rejected the possibility of further claims for injunctive relief as a ground to deny appeal from denial of a qualified immunity motion:

> The *Harlow* right to immunity is a right to immunity *from certain claims*, not from litigation in general; when immunity with respect to those claims has been finally denied, appeal must be available, and cannot be foreclosed by the mere addition of other claims to the suit. Making appealability depend upon such a factor, particular to the case at hand, would violate the principle discussed above, that appealability determinations are made for classes of decisions, not individual orders in specific cases. Apart from these objections in principle, the practical effect of respondent's proposal would be intolerable. If the district court rules erroneously, the qualified-immunity right not to be subjected to pretrial proceedings will be eliminated, so long as the plaintiff has alleged (with or without evidence to back it up) violation of one "clearly established" right; and both that and the further right not to be subjected to trial itself will be eliminated, so long

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[4] As noted, Respondent did not have a claim for injunctive relief pending when Petitioners filed their notice of appeal to the Supreme Court of Idaho.

as the complaint seeks injunctive relief (for which no "clearly established" right need be alleged).

___ U.S., at ___, 116 S. Ct., at 841-42. The proposed rule of law that pending claims for injunctive relief cancel appealability of qualified immunity motions has been and should continue to be rejected.

Further, as injunctive relief is commonly sought in § 1983 actions brought in federal court, as well as those brought in state court, a request for injunctive relief in a state court action is not a basis for different treatment of § 1983 appeals in these two court systems. Because injunctive relief can be sought regardless of where the action is brought, a request for such relief in a state court should not create different ground rules in the state versus the federal forum.

VI. PETITIONERS ARE NOT SEEKING TO FEDERALIZE STATE PROCEDURAL LAW

Respondent has also attempted to cast the issue in this case as whether state procedural laws must always "mirror" federal procedural laws when a federal case is brought in state court, arguing that "under petitioners' approach, virtually every aspect of state procedure would be at risk." Respondent's Br., p. 20. This characterization of Petitioners' argument is no more accurate than similar characterizations would have been in *Felder, Dice, Brown* or *Garrett*. Petitioners are aware that the general rule is that "states may apply their own neutral procedural rules to federal claims unless those rules are preempted by federal law," *Howlett v. Rose*, 496 U.S., at 372, 110 S. Ct., at 2441, and Petitioners do not dispute this general rule. Rather, Petitioners are arguing that their case falls into that category of cases where a well-established exception to this general rule applies: State law must yield when it burdens a substantial right of the litigants under federal law.

Further, with the exception of contending that they have a federal qualified immunity defense that can only be protected by a right of immediate appeal, Petitioners have accepted all other civil and appellate procedural rules without

objection and do not contend that the Idaho courts have "an obligation to follow the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, or the procedural provisions of the United States Code." Respondent's Br., p. 13.[5]

However, there is no state procedural rule with which Petitioners can comply to obtain an immediate review as of right of the state trial court's order denying their qualified immunity motion. Without review, if the trial court has erred, Petitioners will have lost their most important federal defense to a § 1983 case. It is this outcome that directly contradicts this Court's mandate that state courts hearing federal cases must proceed in a manner that protects the substantial rights of the litigants under federal law. *Felder v. Casey*, 487 U.S., at 151, 108 S. Ct., at 2314. Idaho's policy does not simply "dig into" the federal immunity entitlement. If the state trial court rules erroneously, the state policy of denying immediate appellate review effectively eliminates the benefits of the federal defense.

VII. SECTION 1983 DEFENDANTS SHOULD NOT BE REQUIRED TO REMOVE THEIR CASES TO FEDERAL COURT TO ENSURE THEIR FEDERAL RIGHTS ARE PROTECTED

Respondent urges that "[r]emoval is the manner in which Congress has chosen to address differences between state and federal courts." Respondent's Br., p. 20. Respondent further suggests that by remaining in state court, Petitioners receive some benefits from state court procedures and, therefore, they

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[5] For example, it is the law of the Ninth Circuit Court of Appeals, the circuit where Idaho is located, that when records of administrative agencies are provided in support of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the motion to dismiss is not converted into a motion for summary judgment. *E.g., Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). The Idaho District Court converted Petitioners' 12(b)(6) motion into a summary judgment motion when administrative records were introduced, J.A., p. 63, and Petitioners have not and do not claim a federally protected right different from that result.

must also accept any disadvantages. But, this argument was expressly rejected in *Felder,* where this Court stated that "however equitable the bitter-with-the-sweet argument may appear in the abstract, it has no place under our Supremacy Clause analysis." 487 U.S., at 150, 108 S. Ct., at 2313. This principle, applied to the benefit of § 1983 plaintiffs in *Felder*, should also apply to the § 1983 defendants here.

Congress gave the States concurrent jurisdiction over § 1983 litigation. *Felder*, 487 U.S., at 139, 108 S. Ct., at 2307. State court systems, when they open their doors to § 1983 claims, are not free to defeat federal policy or alter the elements of the federal claim or defense. It is no response to assert that a § 1983 defendant who wants his or her federal rights protected can go to federal court. As this Court noted in *Felder,* "States may make litigation of federal rights as congenial as they see fit – not as a quid pro quo for compliance with other, uncongenial rules, but because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals." *Id.*, at 151, 108 S. Ct., at 2313. In *Howlett v. Rose*, 496 U.S., at 383, 110 S. Ct., at 2446, this Court stated that Congress "[took] common-law principles into account in providing certain forms of absolute and qualified immunity" when enacting 42 U.S.C. § 1983. Further, this Court has noted that Congress desired "that the federal civil rights laws be given a uniform application within each state," *Wilson v. Garcia*, 471 U.S. 261, 274-275, 105 S. Ct. 1938, 1946-1947, 85 L. Ed. 2d 254 (1985), and that the "elements of and the defenses to, a federal cause of action are defined by federal law," *Howlett*, 496 U.S., at 375, 110 S. Ct., at 2442. To argue that § 1983 defendants who want the primary benefits of their federal defense preserved must go to federal court ignores each of these principles. Idaho courts are not free to alter the elements of the § 1983 claim; they should not be able to proceed in a manner that eliminates or undermines the primary federal defense as a cost for litigating the federal claim in a state forum.

VIII. REQUIRING IDAHO COURTS TO PROTECT THE QUALIFIED IMMUNITY DEFENSE DOES NOT UNDERMINE FEDERALISM

In a somewhat related argument, Respondent also contends that requiring an immediate appeal disrupts the state's allocation of authority between appellate and trial courts and undermines federalism. Respondent's Br., pp. 12-17, 37-41. It is not apparent why requiring an appeal earlier in a lawsuit rather than later is more invasive of sovereignty than ordering a State to send a factual issue to a jury and not a judge, see *Dice*, holding that a State must open its court doors to hear certain federal claims, see *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 910, 91 L. Ed. 967 (1947), or holding that States cannot apply notice-of-claim or exhaustion of administrative remedy requirements before hearing § 1983 cases in their courts, see *Felder* and *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).

Idaho has an appellate court system of general jurisdiction comprised of the Idaho Supreme Court and the Idaho Court of Appeals.[6] Idaho's appellate courts have the ability to hear and do hear interlocutory appeals in a number of areas. See Petitioners' Br., pp. 17-18. Idaho has voluntarily opened its court doors to § 1983 litigation. The Idaho courts have the responsibility to proceed in a manner that protects the substantial federal rights of the § 1983 litigants, including the qualified immunity rights of the defendants. Petitioners do not ask this Court to order the Idaho legal system to create

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[6] The Idaho Supreme Court has jurisdiction to hear Petitioners' appeal. Idaho Const., art. V, § 9 gives the Idaho Supreme Court "jurisdiction to review, upon appeal, any decision of the district courts, or of the judges thereof." Indeed, the Idaho Supreme Court has held that this constitutional jurisdiction gives it plenary power to review decisions that are not appealable as a matter of right. "[Art. V, § 9] gives this Court power to review 'any decision' of the district courts even though I.C. § 19-2804 does not give the aggrieved party, in this case the state, a right of appeal to this Court." *State v. Lewis*, 96 Idaho 743, 745, 536 P.2d 738, 740 (1975). The Idaho Court of Appeals also has jurisdiction to be assigned Petitioners' appeal. Idaho Code § 1-2406 (1990).

anything that is not now in place; the machinery to hear their appeal is already there. Petitioners only ask that the existing machinery be used to protect the substantial federal rights at stake.

Petitioners also note that *Felder* rejected a similar federalism argument, concluding that the "very notions of federalism upon which respondents rely dictate that the state's outcome determinative law must give way when a party asserts a federal right in state court." 487 U.S., at 150-51, 108 S. Ct., at 2313. Just as Idaho courts cannot apply state procedures that alter the outcome for a litigant bringing a federal case, they should not be able to apply procedures that alter the outcome for a litigant defending one.

IX. THE INTERESTS AT STAKE INCLUDE THOSE OF THE PETITIONERS SUED IN THEIR INDIVIDUAL CAPACITIES AS WELL AS THOSE OF THE STATE

Respondent urges that the only interests here are those of the State, and "if a state has concluded that these state interests are not sufficient to justify affording state officials an interlocutory appeal, there is no reason to construe federal law to preempt state law." Respondent's Br., p. 37. In a similar vein, Respondent characterizes this case as "present[ing] the somewhat unusual spectacle of a state Attorney General attacking the validity of his own state's Appellate Rules." *Id.*, p. 39.

Certainly, Idaho's interests here are pressing. Idaho has an interest in preserving the effective functioning of government and protecting its officers from the burdens that can be imposed by discovery and trial.[7] However, there are more than just the State's interests at stake here. Petitioners are sued in their individual capacities. Qualified immunity is their personal defense. Indeed, the State is not a person who can be named as a defendant in a § 1983 action, whether that action

[7] In fact, Idaho's requirement of a tort claim filing, which is pre-empted by *Felder*, is an expression of those interests.

is brought in state or federal court. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). Therefore, it would be anomalous to suggest that when the Idaho Attorney General represents these Petitioners, he can or should waive a defense personal to them.[8]

Further, when rights under federal law are undermined by state appellate rules, the injured party does not have a responsibility before seeking review in this Court to try to persuade the state legislature to change the offending state law. Respondent's Br., pp. 39-40. Indeed, in Idaho, where the Idaho Supreme Court promulgates court rules and has held that the rules take precedence over conflicting state statutes, it would take a state constitutional amendment for the political branches to alter the Idaho Appellate Rules. See *In re SRBA Case No. 39576*, 128 Idaho 246, 258-259, 912 P.2d 614, 626-627 (1995) (statute conflicting with rule of civil procedure is invalid); *State v. Zimmerman*, 121 Idaho 971, 974, 829 P.2d 861, 864 (1992) (statute conflicting with rule of evidence must yield to rule of evidence); *State v. Currington*, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985) (statute conflicting with rule of criminal procedure is invalid). Petitioners are not required to seek a political solution before seeking judicial relief. Petitioners' request for review by this Court is perfectly appropriate.

Petitioners also note that it is implicit in Respondent's argument that all three branches of Idaho government must speak with one voice regarding allocation of state resources. But, of course, state executive and legislative officers commonly disagree with judicial officers on legal issues on both the state and federal level. Executive officers frequently bring appeals from judicial decisions to higher courts when higher

[8] The Attorney General represents Petitioners in this case because the Idaho Tort Claims Act obligates the State to provide a defense to any of its employees sued in tort "for money damages arising out of any act or omission within the course and scope of [their] employment," with exceptions for acts or omissions done "with malice or criminal intent," whether "the civil lawsuit is brought . . . under Idaho law or is brought . . . under federal law." Idaho Code § 6-903(b)(i) and -(c).

courts are available, which is the only effective remedy for the parties in the case before the lower court, regardless of whether future cases could be decided differently if the legislature changed the law under which the case was decided. Petitioners are not aware of a doctrine of law that executive officers can challenge a state court appellate decision before this Court on federal grounds, which of course is accepted practice, *e.g.*, *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (Florida Attorney General petitioned court to overturn decision of Florida Supreme Court on federal grounds), but cannot challenge a state court appellate rule or the application of a state court appellate rule before this Court on federal grounds.

X. THIS COURT HAS NEVER HELD THAT A STATE MAY MAKE LITIGATING A FEDERAL CLAIM SO CONGENIAL AS TO ALTER THE FEDERAL CAUSE OF ACTION OR UNDERMINE THE FEDERAL DEFENSE

Finally, Respondent argues that, under § 1983, a state may provide remedies more favorable to federal claimants than would exist in federal court and can apply procedures that burden or restrict the federal defense. There is no precedent from this Court holding that a state court may alter the elements of or defenses to a § 1983 case. In making her argument, Respondent relies primarily on a quote from *Felder*, 487 U.S., at 151, 108 S. Ct., at 2313, to the effect that States may make litigation of federal rights as congenial as they see fit as long as "such congeniality does not stand as an obstacle to the accomplishment of Congress' goals." Respondent's Br., p. 41. However, as already discussed, undermining the primary federal defense to a § 1983 claim would defeat both the Congressional intent to keep the common-law immunity intact and "Congress' desire that the federal civil rights laws be given a uniform application within each state." *Howlett*, 496 U.S., at 383, 110 S. Ct., at 2446; *Felder*, 487 U.S., at 153, 108 S. Ct., at 2314.

State courts cannot provide "congenial" forums that add to or subtract from the federal elements or defenses to a § 1983 case. This Court has stated that "the elements of, and defenses to, a federal cause of action are defined by federal law." *Howlett*, 496 U.S., at 375, 110 S. Ct., at 2447. Thus, a state may not apply a state municipal immunity defense to a § 1983 action. *Howlett*. Likewise, a state tort law principle, such as vicarious local government liability, cannot be imported onto a § 1983 claim, even if the state law principle was designed for the protection of federal civil rights and to benefit the plaintiff. *Moor v. County of Alameda*, 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973). A state may not "adulterate" the "dominant characteristic" of a § 1983 action by imposing mandatory settlement periods. *Felder*, 487 U.S., at 148, 108 S. Ct., at 2312. And, a § 1983 plaintiff cannot be made to exhaust state administrative remedies. *Patsy, supra*.

These cases, when viewed as a body, reflect the important objective that the substance of § 1983 litigation be uniform among the federal and state courts. *See also Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985) (all § 1983 litigation to be characterized as personal injury litigation in order that the statute of limitations applied within each state will be the same); *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) (federal civil rights attorney fees award act applies to a § 1983 action brought in state court as well as in federal court). This Court's precedent consistently holds in many contexts that the substance of § 1983 be applied in the same manner regardless of the forum in which an action is brought. There is nothing in this Court's § 1983 precedent to condone a state court proceeding in a manner that undermines or nullifies the key federal defense or applies defenses under the statute differently than would a federal court or courts of other States. While much of this Court's § 1983 precedent has addressed the rights of § 1983 plaintiffs, *Moor* and *Howlett* are clear that just as a State cannot alter the § 1983 claim itself, it also cannot change the federal defense or expand the federal claim to the detriment of the defendant.

Respondent's position that state courts can be so "congenial" as to burden or nullify the federal defense to a § 1983 action, even though, one presumes, the elements to the § 1983 claim must be protected, displays a striking indifference to the federal rights of defendants in § 1983 litigation. There is an element of unfairness to Respondent's position that should not be overlooked. Section 1983 defendants cannot raise state law defenses in state court. For them, their right to the federal defense is just as important as the ability to bring the case is to § 1983 plaintiffs. A § 1983 defendant who is sued in state court and who is entitled to the federal qualified immunity defense should also be entitled to have that defense protected by the state court so that he or she does not have to unnecessarily bear the burdens of discovery and trial.

Respectfully submitted,

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